



**Ongoro v Ouma (Environment and Land Appeal E043 of 2022)
[2023] KEELC 346 (KLR) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 346 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E043 OF 2022
GMA ONGONDO, J
JANUARY 30, 2023**

BETWEEN

CLEMENT KOTONYA ONGORO APPLICANT

AND

OON OUMA RESPONDENT

RULING

1. This ruling is in respect of an application by way of a notice of motion dated September 12, 2022 duly filed on even date by the applicant/appellant, Clement Kotonya Ongoro through the firm of Rapando and Odunga Company Advocates. The applicant is seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. That pending the inter-partes hearing and determination of the appeal, the court be pleased to order stay of execution of the decree and judgment of 30th August, 2022 in Homa-Bay Chief Magistrate’s Court ELC Case No. E001 of 2022-Oon Ouma versus Clement Kotonya Ongoro.
 - d. That any other appropriate reliefs be granted to preserve the subject matter of the Appeal herein.
 - e. That the costs of this application abide the outcome of the Appeal herein.
2. The application is anchored on grounds 1 to 11 set out on it’s face. The same is further based on the applicant’s supporting affidavit sworn on even date and the accompanying document marked as “CKO” annexed thereto. In summary, the applicant laments in part that the trial court rendered judgment on August 30, 2022 and he has been aggrieved thereby. Therefore, he lodged this appeal



which may be rendered nugatory unless an order of stay of execution of the judgment and decree is granted herein.

3. The respondent's counsel was duly served as disclosed in the affidavits of service sworn on September 12, 2022, September 22, 2022, September 28, 2022 and November 3, 2022 by duly licenced process servers.
4. It is important to note that the right to be heard is a fundamental principle of justice as noted in *Halsbury's Laws of England 5th Edition*. 2010 Volume 61 paragraph 639; see also article 50 (1) of [the Constitution](#) of Kenya, 2010 as read with article 25 (C) of the same Constitution.
5. Indeed, the respondent was made aware of the existence of the application as discerned in paragraph 3 hereinabove. He had the right to appear and respond to the same or decline to do so as held in *Ogada-vs-Mollin* (2009) eKLR.
6. On September 15, 2022, the court ordered that the application be heard by way of written submissions.
7. In the submissions dated October 31, 2022 filed on even date, the applicant's counsel termed the application meritorious and urged the court to allow it with costs to the applicant. Counsel relied on, inter alia, order 42 rule 6 (2) of the [Civil Procedure Rules](#), 2010 and the decision in the case of [Butt-vs-Rent Restriction Tribunal](#) (1982) KLR 7, to fortify the submissions.
8. The respondent failed to file any response and submissions in respect of the application.
9. I have duly considered the application and the applicant's submissions. Therefore, has the applicant satisfied the requirements under order 42 rule 6 (supra) for the court to grant of the orders sought in the application?
10. Regarding substantial loss requirement, the applicant contends that the respondent is bound to execute the judgment and decree of the trial court. That as a result, the special circumstances herein are that he may be evicted from the suit parcels of land reference numbers Homa Bay/Kanyango/Karanding/3017 and 3021; see Butt case (supra).
11. Moreover, the memorandum of appeal of dated September 12, 2022 contains triable issues including lawful ownership of the suit parcels of land. As such, failure to grant the order of stay sought may render the appeal nugatory yet it calls for hearing of the issues on merit.
12. In respect of delay, this court is guided by order 50 rules 2, 3, 8 and 9 of the [Civil Procedure Rules](#), 2010 as regards time. The principles of equity including delay defeats equity, are anchored on article 10 (2) (b) of [the Constitution](#) of Kenya, 2010.
13. The applicant delayed by twelve (12) days to commence the application. The said period judged against the character of the application is not unreasonable in the circumstances.
14. Concerning security, no party is exempt from depositing the same in court for the due performance of decree or order; see [Doshi Iron Mongers Ltd-vs-Kenya Revenue Authority and another](#) (2020) eKLR.
15. The requirement of security is within the discretion of the court depending on the obtaining circumstances of the case so as not to prevent this appeal; see also Butt case (supra).
16. In addition, section 13 (7) (a) of the [Environment and Land Court Act](#), 2015 (2011) provides for this court's mandate to grant interim preservation orders. The same include the order of stay sought in the application to preserve the suit parcels of land.



17. The upshot is that the application is meritorious. I proceed to allow the same in terms of order of stay of execution sought therein and as stated in paragraph 1 (c) hereinabove.
18. Costs of the application to abide this appeal.
19. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 30TH DAY OF JANUARY, 2023.

G. M .A ONG'ONDO

JUDGE

PRESENT

1. Mr. Odunga, learned counsel for the appellant
2. Mr Achola, learned counsel for the respondent
3. Luanga, court assistant.

